IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 142

GEORGE WILLIAM MOFFRAM,
Appellant,

v.

THE UNITED STATES,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.
BRIEF FOR APPELLANT.

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This is an appeal from a judgment of the Court of Claims dismissing the amended petition.

The original petition was filed in the Court of Claims March 23, 1922, and an amended petition April 6, 1922. April 24, 1922, the demurrer of the Government to the amended petition was filed. May 8, 1922, the demurrer was argued and May 15, 1922, the order of the Court was filed remanding the cause to the calendar with instructions to the plaintiff to make the allegations of the amended petition relative to the authority of the alleged agents of the United States more specific and definite. May 20, 1922, a second amended petition was filed, and on June 2, 1922, a General Traverse was filed by the defendant. February 12, 1923, the defendant's motion for permis-

sion to take the depositions of A. J. Pledger, Leonard Miller, Fred Mellett, Joseph Rees and I. Ringle before the American Consul General at London, England, with written interrogatories attached thereto, was filed, and on February 19, 1923, the plaintiffs filed a formal objection in writing to the taking of the said depositions, on the ground that the evidence sought tended to prove fraud. On February 23, 1923, a Special Commission was issued to the Hon. Robert P. Skinner, Consul General, at London, England, with interrogatories attached, and on March 5, 1923, plaintiffs' motion to cross-examine the witnesses upon cross interrogatories was allowed. March 12, 1923, the Court overruled the defendant's motion to quash the order allowing the cross-examination of the witnesses and directed that the defendant's brief in support of the said motion to quash be stricken from the record. March 3, 1923, the depositions of A. J. Pledger, Leonard Miller, Fred Mellett, Joseph Rees, and I. Ringle, which were taken under the said Special Commission, were filed. November 15, 1923, plaintiff filed a motion to suppress the same with supporting affidavit attached, on the ground that the witnesses had been paid by counsel for defendant to testify on defendant's behalf, one of them as much as $250.00, which motion was overruled without prejudice, on November 27, 1923. February 12, 1924, the case was argued and submitted. March 3, 1924, the opinion of the Court of Claims (R., 16 et seq.) was filed and judgment of the Court was that date entered (R., 19). April 7, 1924, plaintiff filed a motion for a new trial which was overruled April 14, 1924. January 19, 1925, motion to remand to the Court of Claims was filed in open Court, and overruled by the Supreme Court March 2, 1925.

STATEMENT.

The petitioner in this case alleges in substance that the United States through its duly authorized agents held on June 24 and 25, 1919, at Slough, England, a public auction for the sale of surplus war materials; that the appellant was invited to attend the said sale; that on June 25, 1919, he bid 3¼ pence per pound for 277,312 pounds of Garlock steam packing listed in the catalogue which had been furnished him by the agents of the United States; that his bid was the high bid; that the 277,312 pounds of packing was knocked down to him by the auctioneer; that an itemized bill of sale was rendered him by the auctioneer; that in accordance with the said bill of sale he paid the United States L. 3,756. s. 15. d. 4 for the said packing, receiving from the auctioneer a memorandum of sale and a delivery note; that he demanded delivery of the said packing for which he had paid but the same, or any part thereof, has not been delivered to him; that the agents of the United States in charge of the war materials at Slough declared that there was at Slough no such quantity of packing as that listed in the catalogue and offered for sale at the said auction, and for which payment had been accepted; and that about seven weeks after payment had been made therefor the amount paid by the appellant was by agreement refunded to him by the Selling Agent of the United States without prejudice to the rights of either party to the sale.

The petitioner claims that by reason of the breach of its contract to deliver to him 277,312 pounds of Garlock steam packing as described in the bill of sale and for which payment was accepted by the United States, he is entitled to recover from the United

States as damages the difference between the market value of the packing on the date of the breach, or 3/6 per lb., and the contract price at which he purchased the same, or 3¼ d. per lb., to-wit, L. 44,773.16.3.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the knowledge of the plaintiff that the United States did not have at the Engineers' Depot at Slough, England, on the day of the sale, the quantity of packing which it sold to him, relieved the United States from liability for the breach of its contract of sale with the plaintiff.

2. The Court erred in holding the plaintiff was bound by the terms of the contract between White & Company and the United States.

3. The Court erred in not holding the United States liable in damages for not delivering under its contract with the plaintiff so much packing as it had at the Engineers' Depot at Slough, England, on June 25, 1919.

4. The Court erred in rendering judgment against the plaintiff for costs.

IN GENERAL.

In the forepart of its opinion the Court of Claims held that although the United States sold to appellant 278,432 pounds of Garlock steam packing at 3¼ pence per pound, it was not bound by the contract of sale because appellant knew that the quantity sold could not be delivered, and in the second part of its opinion that the auctioneer had no authority to bind the United States to deliver the quantity sold by him on its behalf.

Obviously, if no obligation was incurred by the

United States by reason of the lack of authority of the auctioneer to bind it upon the sale, it is unnecessary to consider upon what grounds the obligation of the contract may be avoided. This being so, the question of agency involved will be considered first, and after disposing of the question of agency and the other ground upon which the Court of Claims based its decision, by way of anticipation every other possible ground upon which the judgment of the Court of Claims might be affirmed will be discussed.

IV.

APPELLANT NOT BOUND BY TERMS OF CONTRACT BETWEEN THE UNITED STATES AND WHITE & CO.

In the Opinion of the Court, at p. 17, the following appears:

> "But apart from the aspect of the case above referred to the plaintiff has no claim against the United States. All of the plaintiff's transactions were with White & Company. That Company conducted the sale, issued the catlogue, and employed the auctioneer. The plaintiff paid his money to White & Company, received it back from White & Company, and fully recognized that White & Company were the agents of the United States. That agency was governed by the contract which the United States had with White & Company, and all persons dealing with White & Company, as the Agent of the United States, had the duty imposed upon them to inquire as to what its power was in issuing catalogues listing the quantities of articles for sale, and how far statements contained in such catalogues would bind the United States.
>
> "This contract among other things provided: 'The contracting officer assumes no liability for

claims of any character that may be made by purchasers against the contracting officer, and the selling agents shall hold and save the contracting officer and his authorized representatives free and harmless from and against all and every claim, by purchasers and prospective purchasers, that may arise from the operations incident to this agreement.' Under this provision of the contract it is obvious that whatever claim the plaintiff may have it is not such a claim as can be successfully urged against the United States.

"Moreover, it was the duty of White & Company, under the contract to supply all auctioneers, accountants, cashiers, salesmen, engineers, and assistants for the preparation of catalogues, listing and describing the various classes of stores and equipment from the inventories furnished by the contracting officer; and the contract further provides: 'The description and quantities, as stated in the inventories of the contracting officer, are subject to verification by the selling agents, and the contracting officer assumes no liability for the accuracy of such descriptions and quantities.' The Government is, therefore, not bound to take notice and to inform himself of the extent of the authority of the selling agent to bind the Government."

Thus, the Court below held that "the plaintiff paid his money to White & Company * * * * and fully *recognized* that White & Company were the agents of the United States."

It then proceeded to state that "that agency was governed by the contract which the United States had with White & Company, and all persons dealing with White & Company, as the Agent of the United States, had the duty imposed upon them to inquire as to what its power was in issuing catalogues, etc."

It having been adjudicated that White & Company

was the Agent of the United States, is it not obvious that no contract between the Government and White & Company could in any manner relieve the Government from its liability as principal? Did not the contract entered into between the contracting officer and White & Company, wherein the contracting officer was relieved of all liability for errors, etc., and the express undertaking of White & Company to indemnify the Government with respect to such claims as might result from its operations, not only accentuate but demonstrate the liability of the United States as principal?

If the United States was not to be liable as principal, what necessity could there have been for the contracting officer to stipulate in the contract of agency with White & Company for the indemnity of the United States?

Viewed in still another aspect it will be seen that the Court below misstated in its opinion the facts which it did find, and arrived at a conclusion of law not warranted by its own findings of fact.

The Court found that by virtue of the Act of Congress of May 10, 1918, the United States entered into a contract on April 14, 1919, with J. G. White & Co., Ltd., of London, England. (Findings of Fact, Para. II, R. p. 6.)

In Article 19 of the said contract (R. p. 9) it was expressly stipulated as follows:

> "It is agreed between the parties that the interpretation of this contract, and the rights and obligations under it, shall be determined in accordance with English law * * * *."

Who were the parties to this contract is of vital importance in this case.

The preamble of the said contract reads as follows:

> "Articles of agreement entered into this fourteenth day of April, nineteen hundred and nineteen, between Colonel C. R. Pettis, Corps of Engineers, Chief Engineer, Base Section No. 3, S. O. S., American Expeditionary Forces, 29 Great Pulteney Street, London, for the United States of America, hereinafter designated as the Contracting Officer, representing the United States of America, of the first part, and J. G. White & Company, Limited, of 9 Cloak Lane, London, E. C., England, hereinafter designated as the Selling Agents, of the second part.
>
> "Witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:"
>
> (Ibid.)

Then followed twenty-one articles setting forth the conditions of the employment of White & Company as Selling Agent of the United States, and in Articles Nos. 12 and 13 appear those limitations upon the liability of the contracting officer quoted in its opinion by the Court below.

From the terms of the contract itself, therefore, it appears that the contract was between the United States and White & Co., Ltd., and not between Colonel C. R. Pettis, or the Contracting Officer, and White & Company.

Under the law of the United States and the Army Regulations only those officers designated in orders by the Secretary of War are authorized to contract on behalf of the United States. Since the contract of April 14, 1919, which was executed on behalf of the United States by Colonel C. R. Pettis was approved by Major General John Biddle, Commanding Base Section No. 3, S. O. S., A. E. F., presumably Col.

C. R. Pettis was an authorized contracting officer. But this fact did not make him in his capacity as a contracting officer a party to the contract which he executed as contracting officer on behalf of the United States. And it is apparent from the contract itself that he was merely the necessary agent of the United States for the purpose of executing on its behalf a contract, of that class of public agents known as contracting officers.

At the very outset, therefore, it is to be noted that the limitations upon the personal liability of Col. C. R. Pettis, or the Contracting Officer as the Agent of the United States, which were quoted by the Court and are contained in Articles 12 and 13 of the contract, are not limitations upon the liability of his principal, or the United States, or the party of the first part, in the contract.

There is nothing peculiar about this. Agents who contract on behalf of a principal ordinarily limit their personal liability in the contracts which they execute as agent. It was done by R. H. Ruddock, the auctioneer agent of the United States in the Conditions of Sale printed in the catalogue used at the auction sale of June 25, 1919. (See Para. 8, Conditions of Sale, R. p. 11.)

Thus, it was only natural that Colonel Pettis in dealing with a British concern should undertake to make it clear in the contract of agency which he executed on behalf of the United States as Contracting Officer, that he personally was to assume no liability under that contract.

It is a strange assumption of law, however, that would relieve the United States, or one of the principal parties of the contract, of its liability as vendor

and throw upon its selling agent the liability of a principal. Such an interpretation of the contract of April 14, 1919, would violate the fundamental principles of agency, and in effect convert White & Company, the designated and avowed selling agent, into a principal in all its dealings with the property which as a mere agent of the United States it was authorized to sell.

Plainly, therefore, the provisions mentioned had no other effect than to save Colonel Pettis, or the contracting officer who himself was but an agent of the United States, personally harmless for any defaults on the part of his principal or of himself in his capacity as agent.

From the foregoing then, it is seen, that the Court below made a fundamental error of law in assuming that the liability of the United States, or the principal, was limited by the provisions in the contract of April 14, 1919, limiting the liability of its contracting officer or agent.

The Court found that acting upon the authority conferred upon it by the contract of April 14, 1919, J. G. White & Company, Ltd., employed Robert H. Ruddock to sell the engineer stores and equipment at the United States Engineers' Depot at Slough, England, and that acting under the same authority J. G. White & Co., Ltd., advertised in the press of England a sale by auction to be held at the Engineers' Depot at Slough, England, on Tuesday, June 24, 1919, and the days following, and published a catalogue purporting to contain a list of goods to be sold at the said sale.

But the Court did not find that White & Company represented itself as the principal.

On the cover of the catalogue which White & Com-

pany, as the authorized agent of the United States, published and circulated, the following representations appeared:

"Sales Nos. 10 to 13.

"By direction of the U. S. Engineers of the American Expeditionary Force, American Engineers' Depot, Slough.

"Catalogue of the valuable and extensive new engineers' equipment and supplies, constructional material, railway and dock equipment, and stores.

"For sale by auction on Tuesday, 24th June, 1919, and following days at eleven each day.

"Messrs. J. G. White & Co., Ltd., 9 Cloak Lane, London, E. C. 4.

"Robert H. Ruddock, Auctioneer and Valuer, 7 Fleet Street, London, E. C. 4."

(Findings of Fact, Para. III, R. p. 9, 10.)

The catalogue was furnished appellant not by White & Co., the authorized selling agent of the United States, but by another agent, or Robert H. Ruddock, the auctioneer.

(Findings of Fact, Para. VI, R. p. 13.)

It is submitted that from this fact and the representations on the cover of the catalogue no reasonable mind could have concluded otherwise than that the property to be sold was property belonging to the United States, and that Robert H. Ruddock was authorized to act as auctioneer on behalf of and under the directions of the United States.

In Owings v. Hill, 9 Pet. (U. S.) 607, it was held that every authority given to an agent to transact business for his principal must, in the absence of any counter proof, be construed to be to transact it according to the laws of the place where it is to be done.

See also: Saul v. His Creditors, 5 Martin (La.) N. S. 569, 16 Am. Dec. 212;
Cockburn v. Kinsley, 135 Pac. 1112.

The point is well discussed by Mr. Dicey in his Conflict of Laws, Private International Law (2nd Ed. 1908) wherein at p. 609 he states the English rule as follows:

> "When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such country, i. e., the country where the contract is made *(lex loci contractus)*."

And elsewhere in the same discussion he says:

> "Hence ensues the consequence that if P. in one country gives a written authority in general terms to act for him as regards certain matters, e. g., the sale and purchase of goods in different countries, H. may be presumed to have in each country authority to act in accordance with the laws thereof, and in short to do any of the acts which an agent of his class may do under the law of such country."

By definition an auctioneer is a selling agent, and under the law of England, he is until the fall of the hammer, the agent of the vendor alone.

See Warlow v. Harrison, 1 El. & El. 295,
102 E. C. L. 295;
Payne v. Case, 3 T. R. 148.

Therefore, from the representations on the cover of the catalogue and the fact that it was furnished appellant by the auctioneer, the law presumes that R. H. Ruddock had authority to do what an auctioneer in England has authority to do, which is to sell the property of the vendor that is offered for sale in the catalogue, and to bind the disclosed principal as the vendor upon contracts of sale made by him in accordance with the catalogue and the conditions of sale which together

in England constitute the terms of the contract of sale. (See Kenworthy v. Schofield, 2 B. & C. 945, 9 E. C. L. 286.)

But aside from any legal presumption to be drawn from the representations on the cover of the catalogue, the conditions of sale printed on page 2 thereof, expressly stipulated that the United States was the vendor, and the auctioneer its agent.

Thus, in Para. 1 of the said Conditions it was stipulated:

> "The vendors, the U. S. A. Government, reserve the right to bid by themselves or their agents, and withdraw any lot previous to or at the time of sale."
>
> (Ibid. R. p. 10.)
>
> "Inasmuch as the auctioneer acts only as agent, he shall not be considered personally responsible for any default on the part of either purchaser or vendors."
>
> (Para. 8.)
>
> "The auctioneer or vendors shall have full right to enforce any contract made at this sale, and to sue for the full price of the goods * * * *."
>
> (Para. 9.)
>
> "Neither the vendors nor the auctioneer will be liable or responsible for or in respect of any accident which may happen. * * * *."

Inasmuch as the catalogue was in the possession of appellant the law presumes that he had notice of the Conditions of Sale in Para. 1 of which it was expressly stipulated that the United States Government was the vendor.

So, too, the law presumes that appellant had notice of Para. 9 of the said Conditions in which it was expressly stipulated that the vendor, already declared to be the United States, and the auctioneer alone should

have the right to enforce any contract made at the sale, and to sue for the purchase price.

Nowhere in the catalogue did it appear that the contract of sale into which a successful bidder would enter would be between the bidder and J. G. White & Co., Ltd., or between the bidder and anyone else except the vendor, or the United States.

Furthermore, on August 18, 1919, even after the sale was made, appellant received the following letter from Robert H. Ruddock, the auctioneer:

> "Slough Sale, Garlock Packing, Lots 1267 to 1277.
> "Dear Sir: I have to give you notice that the sales of all the lots numbered as above at the auction sale held on Wednesday, 26th June, 1919, by me on behalf of the vendors, the U. S. A. Government, are cancelled by reason of arrangements arrived at by the buyers, which restricted free bidding for the same.
> "You were the purchaser of a portion of this packing, and I inclose Messrs. J. G. White & Co.'s check in your favor for L. 3,755. 15s. 4d., being the purchase money paid by you for the same."
> (Findings of Fact, Para. IX, R. pp. 14, 15.)

Thus, it is apparent that on August 18, 1919, R. H. Ruddock himself held himself to be the agent of the United States, and that he himself believed that the United States and not J. G. White & Co., Ltd., was his principal at the sale of June 25, 1919.

In view of these facts can it be contended with reason that appellant was dealing at the sale of June 25, 1919, with J. G. White & Co., Ltd., and not with the United States through its auctioneer?

Yet, in its opinion the Court said:

> "All of the plaintiff's transactions were with

White & Company. That Company conducted the sale, issued the catalogue, and employed the auctioneer. The plaintiff paid his money to White & Company, received it back from White & Company, and fully recognized that White & Company were the agents of the United States. That agency was governed by the contract which the United States had with White & Company, and all persons dealing with White & Company as the agent of the United States had the duty imposed upon them to inquire as to what its power was in issuing catalogues, listing the quantities of articles for sale, and how far statements contained in such catalogues would bind the United States."

It is quite true that appellant made the check which he gave the auctioneer payable to White & Co. as provided by Para. 4 of the Conditions of Sale. But the fact that White & Co. was designated as the agent to receive the purchase money collected by the auctioneer for the principal in no wise curtailed the ordinary authority of the auctioneer.

In England an auctioneer who is authorized to sell personal property has, in the absence of facts showing a different intention of the vendor, authority to receive and collect the purchase price.

See Capel v. Thornton, 3 C. & P. 352, 14 E. C. L. 343.

In the instant case it was expressly stipulated that payments should be made to the auctioneer. (Paras. 3 and 4, Conditions of Sale, R. p. 10.)

Ordinarily an auctioneer's authority is at an end when the sale is completed and the purchase price is collected.

See Nelson v. Aldridge, 2 Stark. 435, 3 E. C. L. 478.

Therefore, there was nothing unusual in the fact that under Para. 4 of the Conditions of Sale payments were required to be made to the auctioneer by drafts or checks payable to White & Co., and certainly that fact can not be taken to limit the liability of the United States as the disclosed principal or vendor under the contracts of sale by which the auctioneer was expressly authorized in the catalogue and Conditions of Sale to bind the vendor.

Again, even if the delivery to the auctioneer on June 30, 1919, of a check payable to White & Co. for goods sold by the auctioneer on June 25, 1919, did constitute a transaction with White & Co., that transaction was not before the sale, and the facts show that appellant had no dealings of any kind with White & Co. until after the sale.

It is true, as stated by the Court below, that in dealing with an agent a third person must look into the authority of the agent, and that is exactly what appellant did.

But in this case the United States had two agents, one of which, or White & Co., it employed under the contract of April 14, 1919, and one of which, or the auctioneer, White & Co. was authorized to employ on its behalf, and each of these agents was empowered to bind the United States within the scope of their express authority.

It is manifest from the terms of the contract of April 14, 1919, that it was never contemplated that White & Co., though designated therein as the selling agent of the United States, should act as auctioneer at the auction sales it was authorized to hold. The fact that White & Co. was authorized to employ an auctioneer precludes that idea. Furthermore, in

England an auctioneer is required to possess a license before he can act as such, and it does not appear that White & Co. was a licensed auctioneer and could have acted as such.

Therefore, when White & Co. employed R. H. Ruddock to act as auctioneer for the United States it had done its part in so far as the actual selling at the sale of June 25, 1919, was concerned.

At that sale appellant was buying from the United States, not through White & Co., but through the auctioneer, and was, therefore, under no duty to do more than satisfy himself that R. H. Ruddock was authorized to act as auctioneer. This he did by consulting the Conditions of Sale published on behalf of the United States by White & Co., as its authorized agent.

The Conditions of Sale specified the United States as the vendor and Robert H. Ruddock, the auctioneer, as its agent.

In Para. 8 of the Conditions of Sale it was expressly stipulated that the auctioneer should not be personally responsible for any default on the part of the vendor, or the United States.

In the face of these stipulations to whom but the United States, or the announced vendor, could appellant reasonably have been expected to look as the party that would be responsible under any contract into which he might enter?

Would it have been reasonable to require appellant to look further? Would it have been practical to have conducted an auction sale had he been under the duty of doing so?

In the law are found the answers.

"For the acts of his agent within his express

> authority the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority which he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such case would be to enable him to commit a fraud upon innocent persons."
>
> Am. and Eng. Ency. of Law, Vol. II, p. 990.

It is not believed that the citation of further authority on this fundamental principle of agency is necessary, and it is submitted that the Court below in holding that appellant was under the duty of enquiring into the authority of White & Co., under the contract of April 14, 1919, simply overlooked the published Conditions of the Sale.

If there had been no such published conditions of sale which it has been shown were a part of the contract of sale, and Robert H. Ruddock had not been an auctioneer, appellant might have been under the duty of discovering any limitations upon his authority. But when the United States, or the principal, announcing itself as such, held out to the world that it would sell in accordance with the conditions published in its catalogue, in which the authority of the auctioneer as its agent was expressed in terms, appellant was plainly under no duty whatever to go behind the published conditions to discover if by some other prior agreement with another agent inconsistent with those conditions the expressed authority of the auctioneer was limited.

To require a buyer to do this would be to require far more of him than to determine the authority of the agent with whom he was dealing, for in effect it

would be to impose the burden upon him of determining whether the representations of the United States as to its auctioneer's authority were true or false, and this is true whether the auctioneer were actually employed directly by the United States, or by an agent authorized to employ the auctioneer. To say that the principal is not responsible for the acts of his agent within the scope of the latter's express authority, because the third party dealing with the principal through the agent did not discover an undisclosed limitation upon the agent's authority contained in a contract between the principal and a fourth party, or the agent who employed him, would be to say no less than that a party dealing with a principal through an agent must discover the false representation of the principal as a condition precedent to any obligation on the principal's part. Under any such rule dealing with a principal through any kind of an agent, much less an auctioneer, would be practically impossible.

THE UNITED STATES ESTOPPED FROM SETTING UP ITS CONTRACT OF APRIL 14, 1919, WITH WHITE & CO.

Even if the limitations in the contract of April 14, 1919, between the United States and White & Co., be held to be limitations upon the liability of the United States, the United States is estopped from setting up the contract of April 14, 1919, by way of defense herein.

It is a well-settled rule of equity which has been adopted by courts of law in both England and the United States that where one party by his acts, or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence in-

duced another to believe certain facts to exist, and that other has acted on this belief, so that he will be prejudiced if the existence of those facts is permitted to be denied, the other party is conclusively estopped to interpose a denial thereof.

See Carr v. London, etc. R. Co., L. R. 10 C. P. 316.
Pickard v. Sears, 6 Ad. & El. 469, 33 E. C. L. 115.
Mich. Ins. Bank v. Eldred, 6 Miss. (U. S.) 373.

There can not be the slightest doubt that it was the common intention of the United States, White & Co. and Robert H. Ruddock, that Robert H. Ruddock should act as auctioneer for the United States at the sale of June 25, 1919, in accordance with the published Conditions of Sale.

The principle is elementary and uniform that a power given an agent in a transaction carries with it the authority to do whatever is usual and necessary to carry into effect the principal power.

See Pole v. Leask, 28 Bear. 562.
Heninrich v. Sutton, L. R. 6 Ch. 220.
Howard v. Baillie, 2 H. Bl. 618.

And it has been shown that the authority of an auctioneer includes the right to sell in accordance with the conditions of sale imposed by the principal, and that sales made in accordance with the conditions of sale constitute the contracts which the auctioneer is authorized to make on behalf of his principal.

See Kenworthy v. Schofield, 2 B. & C. 945, 9 E. C. L. 286.

Therefore, under the doctrine of *estoppel in pais* the contract of April 14, 1919, between the United States and White & Co., can not be set up to deny the powers conferred upon the auctioneer in the Condi-

tions of Sale published by the United States pursuant to which appellant entered into the contract of June 25, 1919.

But there is still another circumstance that under the doctrine of *estoppel in pais* precludes the United States from setting up this contract.

It was found by the Court of Claims that when White & Co. accepted appellant's check on June 30, 1919, in payment for the material sold to him, it knew that there was no such quantity of Garlock steam packing at the Engineers' depot at Slough, England.

If White & Co. was the only agent that could bind the United States on the sale, which, in effect was held by the Court below, it requires no authority to support the proposition that the United States could not, through White & Co. accept payment for what it knew it did not own and then defend against delivering what it sold on the ground that its agent by virtue of an undisclosed agreement was alone liable in damages for the defaults of the United States. To permit the United States to do this would violate the most fundamental principles of equity.

THE FACTS HEREIN DID NOT WARRANT THE PRESUMPTION OF FRAUD; FRAUD WAS NOT PLEADED AND CAN NOT BE SET UP AS A DEFENSE HEREIN.

In the opinion of the Court (R. p. 17) it was also said:

> "The plaintiff having knowledge that the quantity of packing which he bid for was not in the possession of the vendor, and knowing when he bid and when he paid for the packing that it could not be delivered, he can not be heard in this Court to assert a claim so evidently based upon a design to get something for nothing."

In this language there are premises of fact and a conclusion.

The premises of fact are that there was a sale and that appellant knew the quantity sold could not be delivered.

The conclusion contains at least an imputation of fraud, and it is apparent that it was on the ground of the fraud imputed to appellant by the court below that it based its decision of non-liability on the part of the defendant.

Thus, it is seen, that having been compelled by the facts to find a contract, the Court below undertook to set it aside on the ground of fraud. But the facts stated in its own premise—that is, that appellant knew the quantity he purchased could not be delivered—did not constitute fraud. Therefore, the error in the decision of the Court below manifests itself in the illogic of the language in which it expressed its opinion, in as much as its conclusion of law does not follow from its own premise of fact.

With respect to the knowledge of appellant as to the quantity of packing in possession of the United States, what the Court below found was as follows:

> "The plaintiff before the sale on June 25, 1919, had made repeated visits to the United States Engineers' Depot at Slough, England, and had full opportunity to acquaint himself with the character and quantity of the supplies which were to be sold at the auction sale. At his request the Garlock steam packing was pointed out to him by one of the employes of the depot on the day before the sale. The Garlock steam packing was all housed together in a part of one warehouse, and it was shown to the plaintiff, and he was given full opportunity to arrive approximately at its quantity. He then had the catalogue which

listed for sale 278,432 pounds of Garlock steam packing. It would have required 560 cases to hold that amount of packing, and it would have required 15,000 cubic feet of space to house it. Such a quantity of packing would have supplied the needs of Great Britain for Garlock packing for twenty years. On many occasions the plaintiff, prior to June 24, 1919, was at the depot, and was given every facility to inspect the goods and supplies which were stored there and which were afterwards sold at the auction sale aforesaid."

(Findings of Fact, Para. VIII, R. 13, 14.)

From the facts stated, however, apparently the Court inferred that appellant must necessarily have known that the United States did not own 278,432 pounds of Garlock steam packing, and knowing this was guilty of fraud in bidding on and buying the property offered for sale.

That an inference of fraud herein was unwarranted appears from the Court's own Findings of Fact, for it was also found as follows:

"The auctioneer did not know that a mistake had been made in the catalogue, and did not know that the quantities of Garlock steam packing listed therein were not present in the depot, and in due course rendered the plaintiff a bill for L. 6,558. 15s. 8d., covering the various purchases made by the plaintiff at said auction sale of June 25, 1919, including the item of L. 3,756. 15s. 4d. for 278,432 pounds of Garlock packing at 3¼ pence per pound." (Findings of Fact, Para. VIII, R. p. 14.)

"The said catalogue was published and put in circulation at least a week before June 24, 1919. * * * *" (Findings of Fact, Para. VI, R. p. 13.)

If the military authorities of the United States in

charge of the sale, the Selling Agent, the employees of the Depot, and the auctioneer saw in the quantity of Garlock steam packing that was listed in the catalogue, and that was actually put up and sold to appellant, no cause for suspecting a mistake in the catalogue, how could the Court conclude that appellant necessarily knew of that mistake?

And what if he did visit the depot many times before the sale? It was not conclusive that what was there then was all that would be there on the day of the sale. Nor was it out of reason that all the packing to be sold was not in the warehouse at Slough.

In the nature of things appellant could not be as familiar with the vast stocks of material in the Government warehouses as were the military authorities and the employees in charge of them, and he was certainly not more familiar with materials of the character that were offered for sale than J. G. White & Co., the Selling Agent, and the expert auctioneer employed by that concern to represent the United States, whose regular business it was to deal with such materials.

Again, the past requirements of Great Britain for such materials was no gauge of Great Britain's war time needs which in their stupendous magnitude surpassed all previous needs. The mere fact that appellant was able quickly to dispose by sale and options of the entire quantity which he bought is conclusive that dealers in Garlock steam packing, as well as the military authorities of the United States, J. G. White & Co., and the auctioneer did not deem the quantity one that transcended the bounds of all reason.

It is submitted, therefore, first, that the findings of fact herein were not conclusive of knowledge on appellant's part that there was not 278,432 pounds of

Garlock steam packing at the Engineers' Depot on the day of the sale, much less that the United States did not own that quantity, and, second, that these findings not only do not show fraud on the part of appellant but that no inference of fraud is fairly to be drawn from them.

There can be no fraud unless there is deception and the contract is induced thereby.

On this point Benjamin, in his work on Sales, says:

> "Sec. 417. Where the mistake is that of one party only to the contract, and is not made known to the other, the party laboring under the mistake must bear the consequences, in the absence of any fraud or warranty. . . .
>
> "Sec. 418. When the mistake of one party is known to the other, then the question resolves itself generally into one of fraud. . . . . But, as a general rule in sale, the vendor and the purchaser should deal at arms length . . . . so that, even if the purchaser should know that the person was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful, neither party could avoid the contract under the supposed error or mistake. The exception to this rule exists only in cases where, from the relations between the parties, some special duty is incumbent upon the one to make full and candid disclosure of all he knows on the subject to the other. . . ."

And in Section 1497, Williston, in his work on Contracts, says:

> "It has been said that 'there is no legal obligation on the vendor to inform the purchaser that he is under mistake, not induced by the act of the vendor' (Smith v. Hughes, L. R. 6 Q. B. 597, 607, per Blackburn, J., cf. Sec. 1426). And it is undoubtedly the general rule, at least in court of

law, that it is not necessarily fraudulent for one party to a bargain consciously to take advantage of the ignorance or mistake of the other party, provided no words or acts of the former contribute to the mistake, and there is no duty of disclosure arising from a special relation of the parties.

"The leading case for this doctrine is Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214. This was an action by the buyers of tobacco against the sellers to gain possession of it. There was evidence that before the sale the buyer, upon being asked by one of the sellers whether there was any news calculated to enhance its value, was silent although he received news which the seller had not, of the Treaty of Ghent, which terminated the War of 1812. The court below, on the ground that there was no evidence that the plaintiff had asserted or suggested anything to the sellers calculated to impose upon them in regard to this news, directed a verdict for the plaintiff. On exceptions the direction of the court was held erroneous. The question whether any imposition was practiced by the buyer upon the seller it was held, should have been submitted to the jury. Though the actual decision of the court thus tends to the enlargement of the rights of the deceived party, the case is usually cited for the statement of Marshall, C. J., that it could not be laid down as a matter of law that intelligence of extrinsic circumstances which might influence the price of the commodity and were exclusively within the buyer's knowledge must have been communicated to the seller. The case of Smith v. Hughes, L. R. 6 Q. B. 597, from which a quotation has been made in the text, is even more explicit. This was an action for the price of oats. The defendant (the buyer) refused to accept the oats or pay the price because he had been under the impression when he agreed to buy the oats that they were old oats, whereas in fact they were new oats.

The jury found that the seller believed the defendant to be under this impression. The judges at the trial directed the jury on this finding to return a verdict for the defendant. It was held by the Court of Appeals that there must be a new trial. The self deception of the buyer did not enable him to avoid the contract even though known to the seller. See also Turner v. Green (1895) 2 Ch. 205; Greenhalgh v. Brindley (1901) 2 Ch. 324; Cleveland v. Richardson, 132 U. S. 318, 329; Blydenburgh v. Welsh, Baldwin (U. S.) 331; Wilson v. Higbee, 62 Fed. 723; Heydenfelt v. Osmont (Cal.) 175 Pac 1; Morris v. Thompson, 85 Ill. 16; Dayton v. Kidder, 105 Ill. App. 107; Phinney v. Friedman, 224 Mass. 531; Redfield v. Engel, 171 Mich. 207; Benoit v. Perkins (N. H.) 104 Atl. 254; Beninger v. Corwin, 24 N. J. L. (4 Zab) 257; Paul v. Hadley, 23 Barb. 521; Peoples Bank v. Bogart, 81 N. Y. 101; Smith v. Alpin, 150 N. C. 425; Kintzing v. McElrath, 5 Pa. St. 467; Neil v. Shamburg, 158 Pa. St. 263; Rose v. Barclay, 191 Pa. St. 594; Fisher v. Budlong, 10 R. I. 525; Fell v. Lloyd, 4 Comm. (Australia) 572."

In Turner v. Green, 2 Ch. 205, the defendant claimed that a compromise agreement between counsel was not binding because of the suppression of a material fact by plaintiff's counsel. The Court held that mere silence as regards a material fact which one party is not bound to disclose to the other, is no ground for recission. On this point said Chitty, J.:

"The question thus raised is not one of fraud, but as to the doctrine of the Court in granting relief against a claim for specific performance, where the Court has a discretion; but, that is of course a judicial discretion, which cannot be exercised arbitrarily, but only according to settled principles laid down for it by the authorities. I will take

the proposition laid down by Sir Edward Fry in his book (3rd ed. p. 325, para. 705) as a good exposition of the law; there he says: 'Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be ground for recission or a defense to specific performance.'

"It cannot be contended that F. was under any obligation to disclose the result of the telegram; therefore, Mr. B. (counsel for defendant) who argued his case with skill and ingenuity, was driven to say it was a shabby trick on F's part not to disclose the information he had received, and that such conduct was not consistent with the usual practice of solicitors of high standing in their dealings with one another, who would ordinarily have disclosed any such circumstance; therefore, he argued that specific performance ought to be refused because the course adopted in this case would be generally condemned by high minded men. I find myself unable to act judicially on any such ground. Had there been any overreaching by F., or any misleading conversation, with reference to the proceedings in London before the Chief Clerk, at the time the terms of the compromise were settled, a very different case might have been presented on behalf of the defendant, and in such case an obligation might have arisen binding F. at law or in equity, to make a disclosure of all he knew; but I am satisfied on the evidence that no conversation on the subject took place.

"The distinction between the suppression of a fact and mere silence is an old one, and is to be found in a passage from Cicero (De Off. lib. III, c. 13), which is cited by Sir Edward Fry in his book (3rd ed. p. 329)—'Aliud est celare, aliud tacere; neque enim id est celare quicquid reticeas. The obligation to speak is at the root of this proposition.'

"In Walters v. Morgan (3 D. F. & J. 718) where specific performance of an agreement for a lease was being sought, Campbell, L. C., said: 'There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however, it may be viewed by moralists. But a single word. or (I may add) a nod or wink, or the shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for specific performance of the agreement.' This is a correct statement of the law and one which it appears to me, is not to be confined to the sale of lands or goods, but is of general application, except perhaps in the case of contracts requiring *uberima fides,* which involve a duty to make a full disclosure.

"So far, then, without referring to the other authorities which have been mentioned at the bar, the defendant has not made out his case * * * * But there is a case in Ireland (cited by Mr. B) which no doubt is in point—the case of Ellard v. Lord Llandaff (1 Ball & B. 241). In that case specific performance was asked 'of an agreement for a lease, in consideration of the surrender of an old lease.' The old lease depended upon a single life, and that life was, as was known to the plaintiff, but not to the defendant, on the point of expiring when the agreement was entered into; and in those circumstances Lord Manners refused to grant specific performance, and, in his judgment, he certainly makes it a distinct ground. But there was another ground fatal to the plaintiff's case. (viz. that the lease for the life of another would not bind the

remainder man); but as I have said Lord Manners makes the non-disclosure of the life being *in extremis* the ground for refusing specific performance. He quotes Lord Hardwicke in Buxton v. Lister, (3 Atk. 383) 'that nothing is more established in this Court than that every agreement of this kind ought to be certain, fair and just in all its parts. If any of those ingredients are wanting in the case this Court will not decree a specific performance.' Then Lord Manners is reportetd to have proceeded thus: 'All material facts must be known to both parties; and is it not against all principles of equity, that one party, knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance?' The term used by the Lord Chancellor is 'suppress'. The Lord Chancellor whose language I must consider to be properly reported, must have had in his mind, that it was the lessee's duty to disclose. It is upon that ground that he expresses his opinion upon this point. If I may be at liberty to say so, I think Ellard v. Lord Llandaff was a trying case for any judge, and a case in which possibly a temptation might arise to strain the law. I need scarcely add that if that life had dropped, there would be no contract at all, according to the decision of the Court of Exchequer in Strickland v. Turner, (7 Exch. 208). I think, having regard to subsequent authorities, I must take that as a decision, that where there is a duty—or referring to Sir Edward Fry's proposition slightly varied—that where there is an obligation to disclose, the non-disclosure is a defense to a specific performance action. I have not been able to discover, nor have the counsel engaged before me, who seem to have searched the authorities on the matter—any special mention of Ellard v. Llandaff, either approving or disapproving it as it stands reported. But the learned editor of Fry on Specific Performance does apparently question the authority of the case at

page 333 of the 3rd ed., speaking of it in this way: 'The case of Ellard v. Lord Llandaff, if it is to be reported on the ground of silence of the lessee as to the fact that one of the lives in the surrendered lease was, at the time of signing the contract, *in extremis*, rests upon this principle and was so put by Lord Manners in deciding it: 'It is possible that silence which would not constitute fraud may yet constitute such unfairness in a contract as to stay the hand of the court.' If the case is looked upon as one of great hardship upon the defendant in its very special circumstances, and as one which presented a contract which ought not on that ground to be enforced, then the case would stand well on the ground suggested by Sir Edward Fry. But in my opinion, the facts in this case fall far short of what is required, even making the assumption I have made in favor of the defendant; and I come to the conclusion that Mr. F.'s silence in the circumstances in this case, is not sufficient ground for my refusing specific performance."

In Cleveland v. Richardson, 132 U. S. 318. a creditor made a compromise with his debtor for 60c on the dollar, and subsequently sued him to obtain the balance of the claim on the ground of fraudulent action by the debtor in obtaining the compromise by failing to disclose the full extent of his assets. Said Blatchford, J.:

"In a case very much like the one before us (Dambmann v. Schulting, 75 N. Y. 55) it was held that a party can commit a legal fraud in a business transaction with another, only by fraudulent misrepresentations of fact, or by such conduct or artifice for a fraudulent purpose, as will mislead the other party, or throw him off his guard, and cause him to omit inquiry or examination which he would otherwise make; that where there is no such relation of trust or con-

fidence between the parties as imposes upon one the obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had; that ignorance of a fact extrinsic and not essential to a contract, but which if known, might have influenced the action of a party to the contract, is not such a mistake as will authorize equitable relief; and that, as to such facts, the party must rely upon his own vigilance, and if not imposed upon or defrauded, will be held to his contract. That was an action brought to set aside a release under seal, on the ground that it was inoperative, because obtained by misrepresentation and concealment of material facts. It was not found that there was any fraudulent misrepresentation, and there was none in fact, and there was no misrepresentation of any kind, nor was there any fraudulent concealment of any facts; nor was there any statement or artifice used to throw off from his guard or to entrap or mislead the party executing the release. The Court says in its opinion: 'A party buying or selling property, or executing instruments, must by inquiry or examination, gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information that he had.' These views were reaffirmed when the case was again before the court in 85 N. Y. 622.

"In Graham v. N. Y., 99 N. Y. 611, it was held that a compromise made by a debtor with his creditor cannot be assailed on the ground that the debtor omitted to disclose his financial condition; and that where he is not questioned in regard thereto, and does nothing to mislead, he is not bound to make any such disclosure. It was claimed in that case that although there was a failure to show that any fraudulent misrepresenta-

tions were made on the part of the debtor to induce the compromise, yet it ought to be set aside on account of the undue concealment by the debtor and his attorney of the true condition of the estate of the debtor. The Court said: 'But the defendant was not bound to make any disclosure of his financial condition. He was not asked to make any. He made no misrepresentations and did nothing to mislead Graham or prevent him from inquiring, or to throw him off guard. They negotiated at arms length. The defendant was in no trust or confidential relation with him. He bore the simple relation to him of debtor, and he had a right to make the best compromise with him he could, using no fraud or culpable artifice to accomplish the result. Each party to such a compromise has the right to the advantage which his superior skill, foresight and knowledge may give him. The business of the world can be conducted on no other basis. If either party desires information from the other, he must ask it, and he must not be misled or deceived by answers given." * * * *

In Laidlaw v. Organ, 2 Wheat. 178, discussed above by Williston, Marshall, C. J., said:

"The question in this case is whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of the opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within the proper limits, where the means of intelligence are equally as accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other. The court thinks that the absolute instruction of the judge was erroneous, and that the question,

> whether any imposition was practiced by the vendee upon the vendor, ought to have been submitted to the jury."

In the instant case there is no suggestion that appellant resorted to any artifice that might be construed as deception. He merely appeared at an auction sale and bid on the quantity of packing that was listed in the catalogue, offered by the auctioneer at the sale, knocked down to him as high bidder, billed to and paid for by him. And even if it were possible for him to determine in advance the quantity in the warehouse, and even if he did know that there was not 278,432 pounds of Garlock steam packing in the warehouse on the day of the sale, he was in no confidential or fiduciary relation with the United States and, therefore, according to the authorities cited, was under no duty to disclose his knowledge to the United States with whom as an ordinary bidder he was dealing at arms length.

It is therefore, submitted that the conclusion of law of the Court of Claims hereinbefore quoted is utterly unwarranted.

The Court also said (R. 17):

> "And afterwards on June 30, 1919, when he gave to one Davies an option on ninety tons of this packing the plaintiff took care to specify in the option that it was 'subject to the quantity being in stock as sold by the U. S. A.'"

From the fact mentioned the Court inferred both knowledge and fraud on the part of appellant. But it is very clear that the fact that appellant protected himself on resales against the failure of the United States to deliver the quantity purchased by him does not justify the presumption either of knowledge on his part that the United States could

not perform its contract, or fraud on his part. Fortunate, indeed, it was for appellant as the transaction turned out, that he did take the wise precaution of protecting himself in the way he did on his resales else he would have been liable on his contracts of resale to deliver that which was never delivered to him.

What really happened is apparent from the facts.

White & Co., the selling agent of the United States, undertook in collaboration with the military authorities of the United States in charge of the Engineers' Depot at Slough, England, to prepare the catalogue necessary for the auction sale which it advertised was to be held on June 24, 1919, and the days following, and Robert H. Ruddock was engaged by White & Co., as auctioneer to sell on behalf of the United States the property listed in the catalogue.

In transcribing the inventory of material on hand furnished White & Co. by the military authorities a mistake was made by White & Co. which found its way into the catalogue.

(Findings of Fact, Paras. IV, V. R. pp. 12, 13).

White & Co. had been employed to sell the U. S. Engineers' stores at Didcot and elsewhere, as well as at Slough. (Findings of Fact, Para. III, p. 9).

Therefore, although appellant may have visited the depot prior to the sale and endeavored to inspect the quality and condition of the material listed in the catalogue, there was no reason why he should assume that the United States could not deliver the quantity of packing it was offering for sale even if he did not actually find that quantity on hand at the Slough depot.

The mistake that had been made in the catalogue was not one sufficiently manifest to attract the at-

tention of the military authorities, the employees of the depot, the selling agent, or the auctioneer. If they did not detect it there was even less reason why appellant should have done so.

The quantity listed was put up by the auctioneer, knocked down to appellant, and a bill of sale and delivery slip given him. Sometime after the sale and before the time specified for delivery the auctioneer and White & Co. learned that the quantity sold was not at Slough. Yet, they knew that that quantity had been listed in the catalogue and it was up to them to straighten the matter out.

It was possible that the quantity listed in the catalogue was at Didcot or elsewhere, and if it was it could be delivered. Therefore, when on June 30th appellant gave the auctioneer his check payable as required in the Conditions of Sale to White & Co., the latter accepted and cashed it. (Findings of Fact, Para. VIII, R. p. 14).

By July 4th, however, the mistake in the catalogue had been discovered and traced to the office of White & Co., and such was the situation when on that date, the acutioneer notified appellant by telephone that it would be useless for him to present his delivery slip. (Findings of Fact, Para. VIII, R. p. 14).

But appellant had paid for 278,432 pounds of packing, had resold a part of it, and had given options on the rest. Therefore, so soon as he heard from the auctioneer that delivery was not to be made, he addressed a letter to White & Co., formally demanding the performance of the contract.

Knowing that through its carelessness the United States had been obligated to deliver 278,432 pounds of packing, and fearing lest it be held liable for its

mistake, White & Co. now sought to bluff appellant out of any claim, replying that it considered the explanation which it had given and the return of the purchase price was sufficient to close the incident. It did not return the money, however, at this time.

But appellant was not to be bluffed so easily. Somebody was liable to him for his damages. Therefore, he declined to consider the incident closed, and promptly notified White & Co. to that effect.

Having failed to satisfy appellant White & Co. was in a predicament. Appellant was insistent upon his rights. His money could not be kept indefinitely. Plainly something had to be done. Therefore, on August 18, 1919, or about six weeks after payment had been accepted, White & Co. gave the auctioneer a check for the amount paid by appellant and the auctioneer, again acting in concert with White & Co., transmitted it to appellant with a written statement that the sale of June 25, 1919, had been cancelled by the "U. S. A. Government" by reason of "arrangements arrived at by the buyers which restricted free bidding", etc.

The name "U. S. A. Government" had a formidable sound, and coupled with the suggestion that appellant was party to collusive bidding might have an intimidating effect upon appellant if by any chance he were mixed up in one of the bidding rings. Again, appellant naturally would not wish to be mixed up in any proceedings which the United States might institute, even if he were innocent. It would be expensive, too, to enforce his rights.

If White & Co. and the auctioneer had had any proof of collusive bidding on the part of appellant, it is to be presumed the United States would have availed

itself of such evidence in the court below. Lacking such proof, White & Co. and the auctioneer were clever enough not to charge appellant himself with fraud. Thus, in the letter which the latter wrote appellant on August 18, 1919, he merely intimated that there was fraud on the part of "the buyers".

Who the buyers were does not appear in the Findings of Fact, and in them there is no intimation whatever that appellant was party to any arrangement for the suppression of free bidding.

The second effort of White & Co. and the auctioneer to discourage appellant from pressing his claim succeeded no better than the first. Seeing that he was becoming involved with White & Co., Robert H. Ruddock, and the military authorities of the United States, and that the agents of the United States with whom he had dealt were undoubtedly bent on protecting themselves by denying his claim at any cost, he returned the check of White & Co., and with the advice of counsel proceeded to assert his rights in the premises against the United States.

Such, in brief, it is submitted, are the facts that are fairly to be inferred from the facts found by the Court below, and it may well be said that if fraud on the part of anyone is to be inferred from these facts, it was on the part of White & Co., the selling agent of the United States, which accepted plaintiff's money in payment for material which it did not know could be delivered, and after having had the use of the money for six weeks, sought to repudiate the sale on a trumped up charge of collusive bidding which it could not sustain.

But even if it were possible to predicate fraud on the part of appellant upon the facts, the United States can not avail itself of fraud as a defense herein.

The law is well settled that where a party desires to rescind a contract on the ground of fraud or mistake he must, upon the discovery of the facts upon which he bases his demand for relief, at once announce his purpose and adhere to it.

See: Grymes v. Sanders, 93 U. S. 55, 62.
Shapiro v. Goldberg, 192 U. S. 232, 242.
McNaught v. Equitable Life Assurance Society, 136 App. Div. (N. Y.) 774,780.
Wheeler v. Dunn, 13 Colo. 428, 446.

The Court found that when White & Co. accepted appellant's check on June 30, 1919, in payment for the material which he had bought on June 25, 1919, White & Co. knew that there was not 278,432 pounds of Garlock steam packing at the Engineers' Depot at Slough, (Findings of Fact, Para. VIII, R. p. 14), and that on July 4, 1919, the auctioneer informed appellant that "it would be useless for him to present his delivery slip at the depot warehouses for Garlock packing inasmuch as a mistake had been made in the quantity listed in the catalogue, and no such quantity was present in the depot and had never been there." And that in answer to the written demand of appellant on July 4, 1919, White & Co. replied that the information furnished by the auctioneer was correct, and stated that it considered the explanation of how the mistake was made, together with the return of the money paid, sufficient to close the incident. Yet, despite the repeated demands of appellant it was not until August 18, 1919, that the auctioneer, representing himself as the agent of the United States, and not of White & Co., notified appellant that the sale of the lots purchased by him was cancelled on the ground "of arrangements arrived at by the buyers, which restricted

free bidding for the same". (Findings of Fact, Para. IX, R. pp. 15, 16.)

Thus, it is seen that after refusing delivery on July 4, 1919, on one ground, or that of mistake, it was nearly two months after the sale that any reference was made to the ground on which the sale was finally repudiated, and that even then appellant himself was not charged with fraud.

It is apparent from these facts that there was in possession of the defendant July 4, 1919, all the facts that were in its possession on August 18, 1917.

Consequently, it can not be said that the United States either acted with that promptitude in announcing its purpose to rescind the contract on the ground of fraud which the authorities cited required of it, or that upon the discovery of the grounds upon which it demanded relief it at once announced its purpose to rely on those grounds and adhered to that purpose.

THE CONDITIONS OF SALE DID NOT RELIEVE THE UNITED STATES FROM LIABILITY IN DAMAGES FOR FAILURE TO DELIVER THE QUANTITY IT SOLD

Paragraph 2 of the "Conditions of Sale" is as follows:

> "The whole shall be sold, with all faults, imperfections, errors of description, in the lots of the catalogue; or as they may be divided or conjoined at the sale, and without any warranty whatever, the buyers being held to have satisfied themselves as to the condition, quality, and description of the lots before bidding. * * * *"

Because the material sold to appellant was sold by the United States without any warranty whatever does not mean that the United States did not incur liability

in damages for failure to deliver the quantity of packing which it sold.

A warranty is merely an assurance of some fact coupled with an agreement, express or implied, to make good, or pay for the deficiency. In other words, it is an express or implied statement of something which a party undertakes shall be a part of a contract, but though part of the contract, collateral to the express object of it, and no action for the breach of a warranty lies until the property in the goods has passed.

Inasmuch as the obligation to deliver the quantity sold under a contract where the goods are sold on a quantity basis, is the main undertaking of the contract, and not a collateral undertaking, in such case there can be no warranty of quantity. Plainly, if a warranty of quantity were required it would be impossible for a buyer to whom the property had not passed ever to sue for non-delivery of the proper quantity.

But aside from the meaning of warranty the language contained in Para. 2 of the Conditions of Sale itself excludes the idea of non-liability on the part of the vendor to deliver the quantity actually sold since in this stipulation it was expressly provided that "the *whole* shall be sold, with all faults, imperfections, errors of description, in the lots of the catalogue; or as these may be divided or conjoined at the sale, and without any warranty whatever, the buyers being held to have satisfied themselves as to the condition, quality, and description of the lots before bidding."

From the foregoing it is seen that "the whole", or the quantity to be sold, might be a part of a lot as listed in the catalogue, or it might be the aggregate

of several lots. What the whole was to be a prospective bidder could not determine in advance of the sale since the auctioneer had the right to divide or conjoin at the sale. The mere fact then, that the vendor had the right at the sale to divide or conjoin the quantities represented in the catalogue to comprise the lots, necessarily made it impossible for a prospective bidder to determine finally in advance what quantity might constitute "the whole" that might be offered for sale, and plainly shows that the faults, imperfections, and errors of description referred to were faults, imperfections, and errors of description in the condition and quality, and description of the material comprising the lots, and not in the quantity that might be offered.

This view is also borne out by the express provision contained in Para. 5 of the Conditions of Sale, to-wit: "No allowance whatever will be made for errors in description or quality, but the lots are to be cleared as shown at the sale."

Will it be contended here that the errors in description referred to in this provision included errors in quantity? That where a lot was listed as containing 278,432 pounds of Garlock steam packing, it was intended that the United States might collect 3¼ pence per pound for 278,432 pounds of packing, deliver 2784.32 pounds of packing, and retain the full amount collected?

Such a contention would be an absurdity. It is plain that the United States never asssumed that it had such a right for upon finding that it had but 2784.32 pounds of packing instead of 278,432 pounds, it returned the entire purchase price of L. 3,755. 15s. 4d. to appellant. (Findings of Fact, Para. IX, p. 15.)

Not only did the Conditions of Sale not require that

a bidder should satisfy himself in advance that the quantity to be offered for sale was on hand, but since there was no express requirement to that effect they did not give him the right to do so for no such right is implied in law.

In Pettitt v. Mitchell, 4 M. & G. 819, 826, 43 E. C. L. 423, 134 Reprint 337, there was a sale at auction of woolen goods by a catalogue in which was printed the following condition: "Mr. P. begs to announce that the stock comprised in this catalogue has been measured to the yard's end, and will be delivered with all faults and errors of description . . . . all the small remnants must be cleared at the measure stated in the catalogue." The catalogue purported to give the correct measure of each lot just as in the instant case. It was held that under the condition quoted the right of the purchaser to measure a lot before paying the purchase price, or the amount at which it had been knocked down to him, would not be implied by law.

It would seem certain that if in the absence of an express provision in the Conditions of Sale for the measuring of the quantity by a successful bidder the law does not imply that right on his part, the vendor can not impose upon him the obligation to do so.

Furthermore, even where an express provision is made that a bidder shall satisfy himself as to the quantity on hand in advance of bidding, it is one thing to requre that the quantity be measured, and another to make the actual measurement possible. In the instant case even had the measurement of the quantity been made a condition precedent to the liability of the vendor upon the sale, the fulfillment of the condition would have been practically impossible. That would

have necessitated the opening by each prospective bidder or possible buyer of innumerable cases at an expense of labor and time to each party to the auction sale of June 25, 1919, which would have made the conduct of the sale impossible, and it is, therefore, unreasonable to assume that the authorities conducting the sale would have permitted such an inspection on the day of the sale even had it been required in the conditions.

Obviously, too, any such inspection that might have been made previous to the day of the sale would not have been conclusive of the quantity that would be on hand on the day of the sale.

It has been shown that White & Co. knew when it accepted and cashed appellant's check that the quantity sold was not and never had been at the Slough depot. From this fact it is only reasonable to infer that the selling agent who was authorized to sell not only the Engineers' stores at Slough but at Didcot and other points as well, saw no reason why delivery could not be made even if the quantity sold was not at Slough. If this be not a reasonable inference, the selling agent was guilty of a fraud in accepting payment for what it knew could not be delivered.

THE MISTAKE THAT WAS MADE IN THE CATALOGUE DISTINGUISHED FROM A MISTAKE IN A SALE BASED THEREON, AND THE UNITED STATES IS LIABLE THEREFOR

There is a clear distinction to be drawn between the particulars of a sale as set out in a catalogue, and the conditions of the sale. As said in Torrance v. Bolton, L. R. 14 Eq. 124, (aff. L. R. 8 Ch. 118), the office of

the catalogue or particulars of the sale is to describe the subject matter of the contract, and of the Conditions of Sale to state the terms in accordance with which it is to be sold.

This being so, there is also a clear distinction to be drawn between a mistake in a catalogue, and a mistake in a sale.

Sheldon v. Capron, 3 R. I. 171, was a case in which there was a mistake in the sale. Said Staples, C. J., therein:

> "If the plaintiffs handed out box No. 25, which did contain eight and one-sixth dozen filled and chased soft solder rings, and put it up at auction, calling it No. 24, which did contain fourteen and one-sixth dozen filled and chased hard solder rings, and it was bid upon and finally struck off by them to Mathewson & Allen, it can not be pretended that the purchasers would be required to take it as their bid. The minds of the parties never met. No contract was made between them. The plaintiffs were selling one thing, and Mathewson & Allen purchasing or rather bidding upon another."

But if a vendor offers to sell a quantity of goods of which his catalogue erroneously represents him to be the owner, and the vendee agrees to buy that quantity, obviously there has been a meeting of minds on their part, and each has done exactly what he intended to do. In such case there has been no mistake whatever in the sale of the goods, even though the vendor may have made a mistake in believing that he owned what he did not own.

> "In preparing the typewritten sheets for mimeographing an error occurred in that one of the stenographers read the abbreviation on said rough notes intended for pounds avoirdupois, as hun-

dredweights, and so recorded it on the typewritten sheet in connection with the listing of certain Garlock steam packing, the subject matter of this suit. Those mimeographed sheets were used in the preparation of the catalogue by J. G. White & Company, Limited, and were not verified by them; and when the catalogue was published and distributed it listed the quantity of Garlock steam packing as being hundredweights instead of pounds. * * * *" (Findings of Fact, Para. V, R. p. 13. See also Para. IV, R. p. 12.)

In Para I. of the Conditions of Sale printed in the catalogue the following appeared:

> "The vendors, the U. S. A. Government, reserve the right to bid by themselves or their agents, and withdraw any lot previous to or at the time of sale." (Ibid, p. 10.)

And it has been shown that 278,432 pounds of packing was in fact offered at the sale, knocked down to appellant as the high bidder, billed to him, and payment therefor accepted.

The foregoing findings are conclusive of the fact that the United States, or the vendor, believed it was the owner of and intended to sell the 278,432 pounds of Garlock steam packing which it did sell to appellant, and also of the fact that the mistake which was made in the catalogue was its own mistake and was in no wise contributed to by appellant.

It is also clear that since the catalogue was circulated at least a week in advance of the sale the United States had ample opportunity to detect the errors it contained.

So much for the mistake in the catalogue, and how it was made. The liability of the United States for that mistake is clear.

"A contract for the sale of goods is to be construed in accordance with the law of the place where delivery is to be made, or the contract is to be performed."

In re Pittsburgh Industrial Iron Works (D. C. 1910), 178 Fed. 151.

The particulars or catalogue and the conditions of sale together constitute the terms of the contract of a sale at auction.

See Kenworthy v. Schofield, 2 B. & C. 945, 9 E. C. L. 286.

A catalogue should contain a faithful description of the property offered for sale, in language so clear and unambiguous that persons of ordinary understanding will not be deceived as to either its character or identity.

See Flight v. Booth, 1 Benj. N. Cas. 370, 27 E. C. L. 421.

A misdescription in a material matter upon which the purchaser might reasonablly rely and did rely to his damage, has frequentlly been held to be a ground for avoidance of the contract by the buyer.

See Stevens v. Adamson, 2 Stark. 422, 3 E. C. L. 472.

And it has been so held even when the conditions of sale provided that errors or misdescriptions should not avoid the contract.

See Dobell v. Hutchinson, 3 Ad. & El. E. C. L. 118.

If possible, all errors and omissions in the written or printed copies of the catalogue or particulars of sale should be corrected before circulation, by writing in the desired change. If this is impossible, the auctioneer should state clearly the alteration. The pur-

chaser will not be bound by the error unless he has notice actual or constructive of the change.

See Manser v. Back, 6 Hare 443;
Shelton v. Livius, 1 L. J. Exch. 139;
Page v. Eduljee, L. R. 1 P. C. 127;
Eden v. Blake, 13 M. & W. 614; 14 L. J. Exch. 194;
Rankin v. Matthews, 7 Ired. (N. Car.) 286;
Satterfield v. Smith, 11 Ired. (N. Car.) 60;
Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353.

In the instant case not only did the auctioneer not make any change in the catalogue at the sale but he offered at the sale of June 25, 1919, exactly the quantity listed in the catalogue.

It has already been shown that the conditions of sale did not require appellant to measure the material purchased by him in advance of the sale, and that under the circumstances such a requirement would have been impractical and, therefore, ineffective had it been imposed.

The law is quite clear that a vendor, merely by showing that it was possible for the vendee to verify representations inducing the sale, cannot escape the consequences of a positive misrepresentation as to quantity where quantity is of the essence of the contract, and it is submitted that this is a principle that is common to the sale of goods and the sale of land.

In Stevens v. Giddings, 45 Conn. 507, there was a sale at auction to a purchaser who lived in the vicinity of the land sold and had an opportunity to measure the same. Instead of doing so, he relied on the advertisement of the property which represented it to be 100 feet in length. The vendor had never measured the lot which turned out to be 95 feet in length.

The Court held that although the defendant did have an opportunity to measure the land he was under no duty to do so because of the positive representation of the vendor as to its size, and that defendant had a right to rescind the contract.

Hays v. Hays, 126 Ind. 92, was a suit in which the purchaser sought to recover back part of the purchase price paid for a certain described tract of land. The complaint proceeded upon the theory that the appellee purchased and paid for the land described at an agreed price per acre, and that the tract did not contain the quantity purchased and paid for by the appellee. It was held that a purchaser of land has a right to rely upon the representations of the vendor relative to the extent and boundaries of his land and is not under any obligation to examine the plats and consult the records, because the law presumes that the owner knows his own property, and that he truly represents it, and if the purchaser trusting to the owner's representations, is misled thereby, to his injury, an action will lie for damages.

In Folsom v. Howell, 94 Ga., 112, the Court said:

> "If administrators in selling land as the property of their intestate represented the boundaries thereof as extending along certain lines from point to point, giving the length of each line, and thus misrepresented the extent and contents of the tract, whereby they were enabled to sell and did sell at a fixed price per acre a tract of land containing 38 and 6/10 acres as a tract containing 50 acres, receiving payment accordingly, the purchaser was defrauded so far as the money paid represented the price of the deficiency, whether the administrators knew their representations were false or not, provided the representations were accepted and treated by the purchaser

as true and he acted and relied upon them in making his purchase, paying his money and receiving his conveyance. If the administrators did not know where the true boundaries of the tract were, they should not have taken upon themselves to point out the same or make any definite and positive representation concerning them which the state of their knowledge did not enable them to make with verity and correctness. While the doctrine of *caveat emptor* would charge the purchaser with looking out for the title which the decedent to the tract offered for sale as his, it would not charge him with looking out for the boundaries of that tract when the administrators undertook to locate and point them out, thus professing to know them sufficiently to enable them to furnish this information to purchasers instead of leaving the latter to their own resources in acquiring the information."

There is nothing peculiar about the rules of law governing mistakes of description in an auction sale. In the nature of things they are absolutely necessary, according as they do with the equitable principle that no man shall profit by his own mistakes at the expense of another.

At an auction sale the property in the goods sold passes at the falling of the hammer. Having acquired the property in the goods the vendee must necessarily be free to dispose of it even though delivery is not yet due. Were this not true and a vendee were not free to sell that which he purchased at an auction for future delivery, dealers in large stocks of material who seldom actually store the stocks they buy would be precluded out of considerations of self-protection from buying at auction. Consequently, a buyer at an auction is given the right at law to rely upon the positive representations of the auctioneer by whose repre-

sentations as the agent of the vendee the vendor is bound.

The law is designed to cover just such a case as the instant case. Plainly, bidders like appellant would not find it practical or profitable to purchase large quantities of material at an auction were the actual handling and storage of it by them necessary. Perceiving an opportunity to realize a profit by bidding in the entire quantity of packing at the very low figure which the auctioneer could command, appellant purchased the entire quantity and immediately undertook to dispose of it in large batches at an advanced price. It was upon such quick resales that he had a right to depend for his profits. And under the existing law even had he not been careful enough to protect himself upon his resales and in the options which he gave, against non-delivery by the United States, and had been compelled to answer in damages for non-delivery under his contracts of resale, he could have recovered his own damages for non-delivery just as those to whom he sold would have been entitled to recover out of him.

Would it here be contended that the United States would have no right to purchase sufficient packing to complete its contract if it saw fit so to do?

Most assuredly not.

It might be that it could have obtained a sufficient quantity to have completed its contract at a much lower price than the contract price at which it sold the packing to appellant. Yet, that fact would not entitle appellant to rescind the contract, any more than its inability to obtain the necessary quantity save at a loss to itself entitled the United States to refuse delivery and at the same time escape liability in damages.

In view of the necessities of modern business and

the authorities cited which recognize those necessities, it is not to be argued with reason that a vendor may advertise for sale 274,432 pounds of packing, offer the same for sale, knock the same down to a high bidder, take his money in payment therefor, have the use of the purchase money, and later because he was unwilling to obtain sufficicient goods for the completion of his contract, rescind the sale on the ground that he did not own the goods and the buyer was either required by the conditions of sale, or had the opportunity to measure the quantity of the goods upon which he bid, the presence of the goods at the place of sale being a condition precedent to the vendor's liability.

EVEN IF QUANTITY SOLD WAS SOLD BY MISTAKE THE UNITED STATES IS LIABLE IN DAMAGES FOR FAILURE TO DELIVER THE QUANTITY SOLD

Even if the facts herein can possiblly be construed to constitute a mistake in the sale of June 25, 1919, such a mistake will not excuse the performance of the contract for the rule both in England and the United States is that whatever his intention may have been, if the seller has manifested another intention to the buyer so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention manifested by him was his real intention. (See Benjamin, Ibid. p. 56.)

And this rule has been uniformly followed and that, too, even in cases in which its application has been considered by the courts to be attended with great hardship. (See Lloyd v. Crispe, 5 Taunt. 249.)

Where there has been no misrepresentation, and where there is no ambiguity in the terms of a contract

of sale, the vendor will not be allowed to evade performance by the simple statement that he has made a mistake. Were not such the law the performance of a contract could rarely be enforced upon an unscrupulous seller who was unwilling to deliver that which he contracted to deliver.

In Griffith v. Jones, 15 Exch. 279, land with standing timber was sold at auction. The vendor claimed by way of defense that the value of the timber had been overlooked by him in the fixing of the reserve price. Said Sir. W. M. James, L. J.:

> "I am of opinion that the relief sought upon this summons cannot be granted. It may be that the agent of the vendors made a mistake as to the amount of the value of the timber on this lot, but it would be very inconvenient if a contract made between vendor and purchaser could, merely on the ground of some mistake by an agent, be set aside. Suppose the purchaser had made a mistake in his valuation of the estate, could I have granted him relief? If I could not do so in that case, why should I do so in this? . . . There has been no fraud and no misconduct on the part of the purchaser; and the mistake, if any, was through neglect on the part of the vendors; and it is now quite clear that biddings cannot be opened except for fraud. I must hold the contract as binding and dismiss the summons with costs."

In Tamplin v. James, 15 Chanc. Div. 215, property was put up for sale under the description of "all that inn with the brew house, outbuildings, and premises known as the Ship, together with the saddler's shop and premises adjoining thereto, situate at N., Nos. 454 and 455 on the title map, and containing by admeasurement, 20 perches more or less".

In the sale room were plans of the property, which consisted of the closes numbered 454 and 455 on the title map. At the back of the property were two pieces of garden ground containing together about 20 perches, not belonging to the vendors, one of which had for many years been occupied with the inn and the other with the saddler's shop, and which were hardly at all fenced off from the premises with which they were occupied. The defendant, who was acquainted with the property and knew that the gardens were occupied along with the inn and saddler's shop, did not look at the plans, and bought in the belief that he was buying the whole of the property in the occupation of the tenants.

Baggallay, L. J., after stating the leading facts, continued:

> "The defendant insists in his statement of defence that he signed the memorandum in the reasonable belief that the property comprized therein included the whole of the premises. . . .
>
> "It is doubtless well established that a court of equity will refuse specific performance of an agreement when the defendant has entered into it under a mistake, and when injustice would be done to him were performance enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional misrepresentation on the part of the plaintiff. (I am now referring to cases of intentional misrepresentation which would fall rather under the category of fraud,) or where from the ambiguity of the agreement, different meanings have been given to it by the different parties. The case of Manser v. Back, (1) is a well known illustration of this. It is true also that specific performance has been refused in cases not coming under either of these heads, as in Malins v.

Freeman. But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evide the performance of it by the simple statement that he has made a mistake. Were such to be the law, the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous. . . .

"The additional land which defendant claims to have included is about 20 perches more. Therefore, if he is right in his contention, he would be entitled to double the amount which the printed particulars state the lot to contain. There, no doubt, is force in the argument that a person unaccustomed to measuring would not know whether a property contained 20 perches or 40 perches but that does not get rid of the effect of the reference to the title map. The defendant appears to have purchased in reliance upon his knowledge of the occupation of the premises without looking at the plans, and probably without paying any attention to the details of the particulars to lot 1, but is a person justified in relying upon knowledge of that kind when he has the means of ascertaining what he buys? I think not. I think that he is not entitled to say to any effectual purpose that he was under a mistake when he did not think it worth while to read the particulars and look at the plans. If that were to be allowed, a person might always escape from completing a contract by swearing that he was mistaken as to what he bought, and great temptation to perjury would be offered. Here the description of the property is accurate and free from ambiguity, and the case is wholly unaffected by Manser v. Back and the other cases in which the defendant has escaped from performance of a contract on the ground of its ambiguity."

A decree for specific performance was therefore made. On appeal James, L. J., said:

"In my opinion the order on appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the title map and this was quite correct. The purchaser says that the title map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it and at the particulars of the sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defense on the ground of mistake can not be sustained. It is not enough for a purchaser to swear, 'I thought the farm sold contained 12 fields, which I knew, and I find it does not include them all', or, 'I thought it contained 100 acres and it only contains 80'. It would open the door to fraud if such a defense was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. Webster v. Cecil is a good instance of that, being a sale where a person snapped at an offer which he must have perfectly well known to have been made by a mistake, and the only fault I find with the case is that the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of

the defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse, he ought to be held to his bargain."

And Brett, L. J., said:

"It would be dangerous to attempt a definition of the cases in which the court will refuse specific performance. The jurisdiction is a delicate one, and the more so since the fusion of Law and Equity, for if the court refuses specific performance it must now, in my opinion, consider the question of damages. Here the property was put up for sale by a description which could not mislead anybody who took reasonable care, for it is defined by reference to numbers on the title map. According to the finding of Baggallay, L. J., the defendant bought under a mistake, but it was a mistake in which he was led solely by not taking reasonable care. The defendant, therefore, has to support the proposition that although there is nothing misleading in the particulars, and his mistake was not on a point of vital importance, and arose entirely from his own negligence, he is to be relieved. I think that such a proposition cannot be maintained. In Webster v. Cecil, the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake."

And Cotton, L. J., said:

"But in my opinion the decision of L. J. Baggallay is right. . . . The defendant says, 'I was under a mistake and believed that my purchase comprized something not included in those closes'. He had no right to make such a mistake, and though he knew that the gardens had for years been occupied and held together with these tenements, he was bound to take notice of the description. In one sense, he was not bound to look at it, but he cannot abstain from looking at it and say that he bought under a reasonable be-

> lief that he was buying something not included in it. There is no injustice in holding a man to a contract which specifically describes the property sold in a way not calculated to mislead."

And in Gray v. Walton, 107 N. Y. 254, it was held that where goods have been sold at auction by mistake as to quantity, the vendee may recover the value of the goods for a refusal to deliver, and that recovery is not limited to the purchase price.

It was found that subsequent to the sale of June 25, 1919, appellant gave an option in writing to R. S. Davies, on from 50 to 90 tons of the packing which he had purchased, and that the said option contained the following: "Subject to the quantity being in stock as sold by the U. S. A." (Findings of Fact, Para. XI.)

In view of the authorities cited, surely it will not be argued that appellant would not have been bound to make deliveries under his contracts of resale had he not protected himself by the provision that the packing which he sold by those contracts should be delivered to him by the United States. In the absence of that provision, the fact that he did not obtain what he expected to obtain from the United States would have helped him not in the least. The law would have required him to perform his contracts of resale or pay damages for their breach. But it may just as well be argued that he would not have been liable for damages for failure to deliver under those contracts because he sold through mistake what he was never to own as that the United States is not liable by reason of the fact that it sold what it did not own and could not deliver unless it procured the necessary quantity of packing to complete its contract.

THERE WAS NO IMPOSSIBILITY OF PERFORMANCE

Impossibility of performance must not be confused with mere inability to deliver at the time and place of sale what is sold.

> "While absolute and inherent impossibility of performance, in its true sense, is always an excuse, as in contracts for the sale of specific property, which then has ceased to exist, or which perishes or is destroyed before the time of performance, yet it is equally clear that what is often called an impossibility is not legally such, and is no excuse for non-performance. Disability is a very different thing from impossibility. A contract to make and deliver a quantity of goods by a stated time may become in one sense impossible by the destruction of the vendor's mill or factory where they are to be made, but that would be no excuse. If a thing is possible itself to be done, possible in the nature of things to be done, a positive contract to do it is binding, though some unforeseen contingency, accident, or calamity may prevent its performance. It must be a *real* impossibility, and not merely a very great inconvenience, hardship, or impracticability."
>
> Benjamin, ibid, p. 33.

In this case there is no finding of fact that it was impossible for the United States to deliver to the plaintiff 278,432 pounds of Garlock steam packing. The evidence merely shows that that quantity was not in possession of the United States on the day of sale at the place where the United States sold it and contracted to deliver it. For all that appears to the contrary the United States may have been the owner of many times as much Garlock packing as the contract called for, and certainly there is nothing to sug-

gest that it was impossible for the United States to purchase the quantity sold by it in order to make good its contract, just as an individual would have been required to do, or adopt the alternative of paying the plaintiff his damages.

From the statement of the law by Benjamin (supra) and the supporting cases, it is seen that even if the packing was to be manufactured at the depot, and the depot and the means of manufacturing it were destroyed after the sale, the United States would not be relieved from the performance of its contract. It is plain, therefore, that the mere failure to own the goods sold at the time and place of the sale does not relieve the vendor from its obligation to deliver what it sold on the ground of impossibililty of performance.

THE CONTRACT OF JUNE 25, 1919, A BINDING CONTRACT

Having disposed of fraud, the conditions of the sale, mistake, and impossibility of performance, as possible grounds of defense, it remains to consider the liability of the United States under the contract of June 25, 1919.

The Court of Claims found that appellant attended the auction sale advertised by the defendant to be held at the U. S. Engineers' Depot at Slough, England, on June 25, 1919, and that when the Garlock steam packing which was listed in the catalogue of the sale which had been furnished to him by the auctioneer was offered for sale, he bid upon the same (Findings of Fact, Para. VI); that in due course the auctioneer rendered appellant a bill covering the various purchases made by him at the auction sale of June 25, 1919, including the item of L. 3,756. 15s. 4d. for 278,432

pounds of Garlock packing which was knocked down to him at 3¼ pence per pound; that appellant's check in full payment of the account rendered to him by the auctioneer was accepted by the auctioneer, cashed by J. G. White & Co., the Selling Agent of the United States, and honored by the banking company upon which it was drawn (Findings of Fact, Para. VIII); and that appellant "made repeated demands upon J. G. White & Co., Limited, for the delivery to him of the 278,432 pounds of Garlock steam packing which he had purchased on June 25, 1919, at the said auction sale, and for which he had paid on June 30, 1919, but the said J. G. White & Co., Limited, refused to deliver the same upon the ground that it was not and never had been in existence. * * * *". (Findings of Fact, Para. IX.)

While the Court found as a matter of fact that the United States did not have 278,432 pounds of Garlock steam packing at the depot, or the place of sale (Findings of Fact, Para. VIII), it was not found that the United States did not own that quantity of Garlock steam packing, nor was it found that the United States could not have possessed itself of that quantity and have delivered it under the contract of sale into which it entered on June 25, 1919, with appellant.

The general rule of law relating to the quantity that must be delivered under a contract that is not separable is well stated by Benjamin (Sales, 6th Am. Ed. E. L., Para. 689) as follows:

> "Under a contract of sale that is not separable the seller is bound to tender or deliver the exact quantity called for, neither more nor less."

The fact that the United States may not have owned 278,432 pounds of Garlock steam packing is imma-

terial to its liability in damages under the contract of sale of June 25, 1919.

> "A contract for the sale of goods to be delivered at a future day is valid, even though the seller does not own the goods or have them in his possession, and has no other means of getting them than to go into the market and buy them, provided an actual transfer of the property is contemplated, i. e., where the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer."—Encyclopedia of U. S. Supreme Court Reports, Vol. X, p. 1025.
>
> "When a seller undertakes to sell property which he has not, even though the buyer knows that the seller is not the owner, the attempted sale implies an obligation on the part of the seller to transfer the title to the buyer thereafter. That is, though the parties purported to make a sale if their intention cannot be effected fully they are held at least to have made a contract."—Williston on Sales, Sec. 137.
>
> "Though the subject matter of the agreement has neither an actual nor potential existence, such an agreement is usually denominated an executory contract, and for its violation the remedy of the party injured is by an action to recover damages." —Bates v. Smith, 47 N. W. 249.

In Hogue-Kellogg Co. v. Baker, 190 Pac. 493, there was a contract for the sale of a crop to be grown in the future on the seller's land and in the contract was incorporated the following provision: "This contract is understood by both parties to pass title and constitute absolute sale." The court held the contract was not void as against the objection that it contemplated a completed sale of property not in existence, the contract being executory notwithstanding the quoted pro-

vision, which merely meant that title should pass whenever the produce became a growing crop; also the contract was held to be not void for lack of mutuality, and in this case the seller was held liable in damages even though the growth of the crop was limited to the seller's land.

Even if it appeared from the facts that both parties believed that the auction sale of June 25, 1919, was to be of material actually located at the U. S. Engineers' Depot at Slough, England, the fact that the United States did not have there 278,432 pounds of Garlock packing, or the quantity which it sold to appellant, would not relieve the United States from the obligation to deliver that quantity or answer in damages.

A case directly in point is the leading case of Pittsburgh Glass Co. v. Kerlin Bros. Co., 122 Fed. 414, in which the facts were as follows: Through correspondence the vendor represented that it had nine miles of pipe in the locality of Tiffin, Ohio. The vendee purchased six miles of this pipe. The vendor delivered under the contract of sale 8,000 feet of pipe, defending as to the rest on the ground that it only had that much in the locality mentioned and that its obligation was limited to the delivery of the quantity it had in that locality. The Court said:

> "There is nothing in the correspondence from which it could be inferred that the quantity of six miles was not material and determinative, and when the plaintiff sold the defendant that quantity out of the nine miles it had offered, it was bound to deliver it. If the plaintiff desired to contract only for such pipe as the defendant might select out of the quantity it had on hand at the place designated in its letter, it should have made its offer accordingly; but when it agreed to sell and deliver 6 miles upon the terms stated, it

could not fulfill its obligation by delivering 8,000 feet."

Applying the rule laid down in the above case to the facts in the instant case, it may be said that if the United States had desired to contract to deliver only so much packing as appellant might select out of the quantity it had on hand at Slough, or the point designated for the sale, it should have made its offer accordingly; but when it agreed to sell and deliver 278,432 pounds of packing and accepted appellant's money for that amount and had the use of appellant's money from June 30 to Augusts 18, 1919, it could not fulfill its obligation by delivering 2,784.32 pounds of packing.

Another case in point is Devine v. Edwards, 101 Ill. 138. In this case the purchaser alleged by way of set-off in an action for debt by vendor that for a number of years he had purchased milk by the gallon from the vendor on the mutual assumption that the cans in which it was shipped contained 8 gallons, an assumption that was found to be erroneous in that the cans fell far short of containing the quantity stated. The question presented to the court was, what was the basis of the past transactions—was the sale by the "eight gallon can", or by the gallon?

The Court said:

> "The contract under which the milk was sold was for a given price per gallon. It was the duty of the appellant to see to it that his cans should hold the quantity which he professed they held. It does not lie in his mouth to complain that appellant did not watch him with the care which the circumstances seemed to demand."

The facts in the instant case differ from those in the piping and milk cases discussed hereinbefore to this ex-

tent: In the two latter cases there were references to locality and to a secondary measure, respectively, that had to be considered by the Court in determining exactly what quantity was sold, whereas the engagement herein was to furnish goods of a certain quality and character to a certain amount, that is, 278,432 pounds of Garlock steam packing. (See Findings of Fact, Para. VIII, R. p. 14.) And the goods were billed and paid for on a pound price basis. (Ibid.) Therefore, in the piping and milk cases a certain judicial discrimination was necessary which in the instant case does not have to be exercised.

It is submitted that this case is to be decided in accordance with the well-established rule laid down in Brawley v. U. S., 96 U. S., 168, in which Mr. Justice Bradley said:

> "From the examination of the authorities it seems to us that the general rules may be expressed as follows: Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, and the quantity is named with the qualifications of "about" or "more or less", or words of like import, the contract applies to the specific lot . . . . but when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract."

It was found by the Court of Claims that 278,432 pounds of Garlock steam packing were sold to appellant on June 25, 1919, at 3¼ pence per pound, and that the market price of Garlock steam packing was then 3/6 per pound.

(Findings of Fact, Paras. VI, XI, R. pp. 13, 16.)

In Williams Bros. v. Edward T. Agius, 1914 Appeal Cases (England) 510, it was held that the measure of damages recoverable for the non-delivery of goods under a contract of sale is the difference between the contract price and the market price at the date of the breach.

The breach occurred on July 4, 1919, when the auctioneer notified appellant that the packing would not be delivered.

Therefore, in the absence of fraud, or some other ground for the setting aside of the contract, appellant is entitled to damages in a sum representing the difference between the value of 278,432 pounds at 3¼ pence per pound, and 278,432 pounds at 3 shillings 6 pence per pound, or L. 44,404.28.

THE UNITED STATES AT LEAST LIABLE FOR FAILURE TO DELIVER 2784.32 POUNDS OF GARLOCK STEAM PACKING

If for some reason other than fraud it be held that the United States is not liable in damages for failure to deliver 278,432 pounds of Garlock steam packing, it must at least be held liable for failure to perform the contract into which it was found by the Court of Claims that it did enter.

Sugden in his valuable work on Vendors, Vol. 1, p. 489, says:

> "If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation although the estate was estimated at that number in an old survey. The rule is the same, though the land is neither bought nor sold professedly by the acre. The general rule, therefore, is where

a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement for so much as the quantity falls short. See also Tarbell v. Bowman, 103 Mass. 341; Solinger v. Jewett, 25 Ind. 479; Tyler v. Anderson, 106 Ind. 185".

In Winston v. Browning, 61 Ala. 80, the point under consideration was ably discussed at length.

In the instant case it was found by the Court that lots 1268 to 1277 were sold to appellant (Findings of Fact, Para. 3, R. p. 10), and that they contained 2784.32 pounds of Garlock steam packing (Ibid. Para. V., R. p. 13), and that the lots were knocked down to appellant at 3¼ pence per pound. (Ibid. Para. VI, R. p. 13.)

On July 4, 1919, appellant demanded that the contract into which he had entered be performed by the United States, and on that date was notified by the auctioneer that delivery would not be made.

While this statement relieved appellant from the necessity of making any further demand for what was due him, both on July 4th and July 10th he gave White & Co. notice in writing that he would stand upon the contract, and those notices must be taken to have constituted demands for the performance of the contract and to have served to preserve any rights he may have had thereunder whether that were to receive 278,432 pounds or 2784.32 pounds of packing.

In view of the contract of June 25, 1919, its breach on July 4, 1919, the formal demands for its performance and the authorities hereinbefore quoted, it is submitted that appellant is at least entitled to damages in a sum representing the difference between 2784.32 pounds of packing at 3¼ pence per pound, or the con-

tract price, and 2784.32 pounds at 3 shillings 6 pence per pound, or the market value at the time of breach, the difference being L. 444.0428.

JUDGMENT FOR COSTS SHOULD NOT HAVE BEEN RENDERED AGAINST APPELLANT

Inasmuch as the plaintiff under the Findings of Fact was entitled at least to recover damages for the breach by the defendant of a contract to deliver so much Garlock steam packing as it had on the day of the sale at the place of the sale, judgment for the damages consequent upon its failure to deliver that quantity should have been entered for appellant with costs, and judgment for the cost of printing the record should not have been entered against him.

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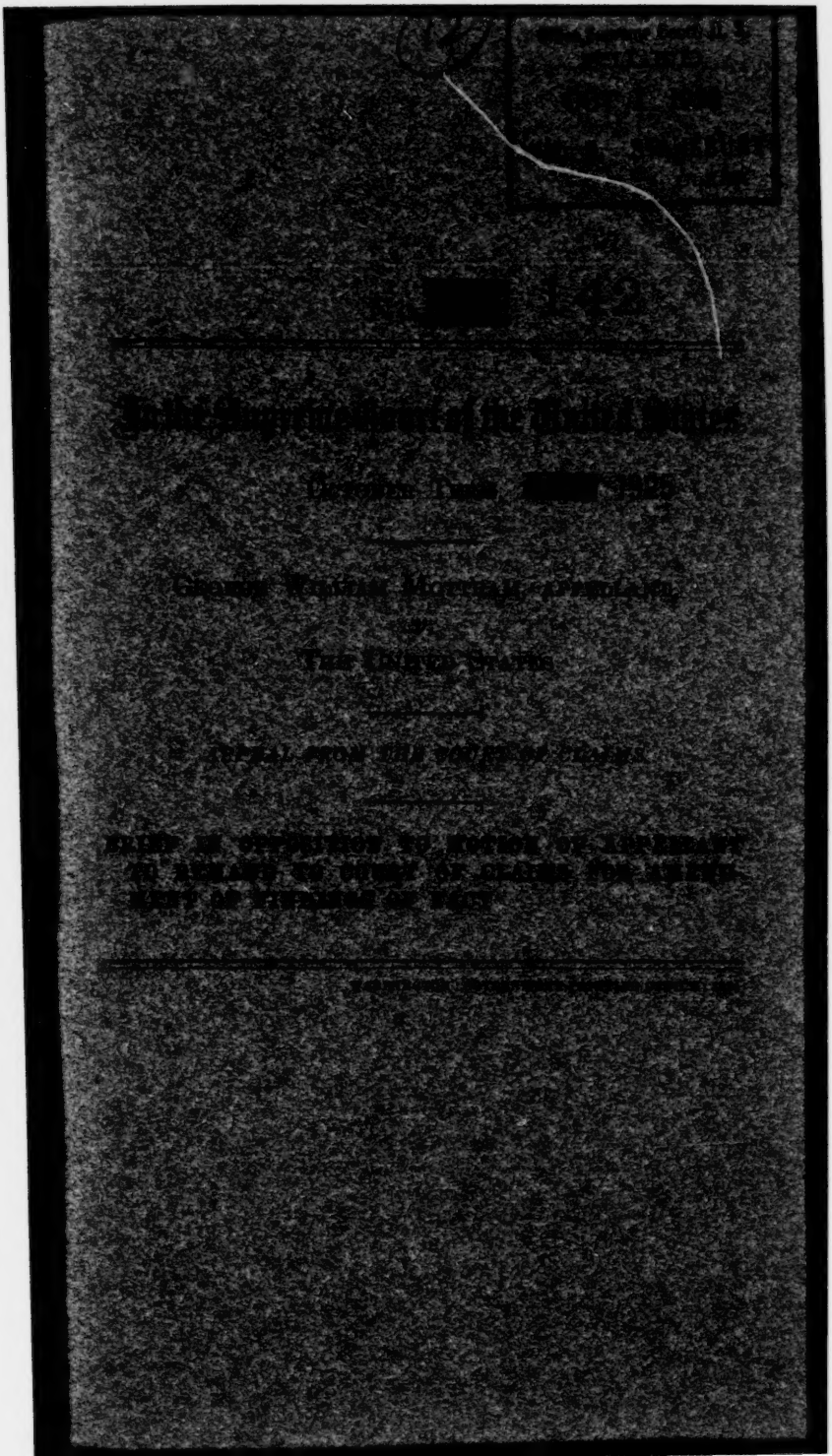

In the Supreme Court of the United States

OCTOBER TERM, 1924

GEORGE WILLIAM MOTTRAM, APPELLANT,
v.
THE UNITED STATES
} No. 545

APPEAL FROM THE COURT OF CLAIMS

BRIEF IN OPPOSITION TO MOTION OF APPELLANT TO REMAND TO COURT OF CLAIMS FOR AMENDMENT OF FINDINGS OF FACT

The United States, by its Solicitor General, objects to the motion of Appellant to remand to the Court of Claims for correction of findings of fact, on the ground that that which is sought by the motion is contrary to the rules and practice of this Court. Appellant asks this Court to remand to the Court of Claims for "correction" of findings of fact, upon the ground that the facts found in the Court below are not based on the evidence. Such a motion would require this Court to weigh testimony, to balance facts, to pass upon the competency, relevancy, and materiality of facts, in short, exhaustively to review the evidence underlying the "statement of facts" as

found by the Court of Claims. This Court has consistently refused to take such action.

Appellant had his day in court when he filed a motion for a new trial below. His motion was overruled. He now seeks a review of that ruling.

The motion should be denied.

JAMES M. BECK,
Solicitor General.
ROBERT H. LOVETT,
Assistant Attorney General.

SEPTEMBER, 1924.